IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, *ex rel.* MARK A. PERRY,	)	
Plaintiff,	)	CIV No. 99-00562 JP/RLP
v.	)	
BURLINGTON RESOURCES, INC. *et al.*,	)	
Defendants.	)	

THE UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION TO TRANSFER THIS SUIT TO THE EASTERN DISTRICT OF TEXAS, LUFKIN DIVISION

This action is one of at least four suits[1] filed in the past four years under the *qui tam* provisions of the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, against various oil and gas companies making similar allegations regarding the knowing underpayment of royalties on natural gas and natural gas liquids (referred to collectively herein as "gas") produced from federal and Indian lands. Except for the instant suit, all of these actions are currently pending before Judge John H. Hannah, Jr., in the Eastern District of Texas, including the very first case filed, *United States ex rel. Wright v. AGIP Petroleum Co.*, Civil Action No. 9:98CV30 (E.D. Tex.).[2]

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[1] This brief does not name any *qui tam* complaints that are under seal.

[2] In addition to these cases involving the undervaluation of gas, there is a multi-district litigation pending in the District of Wyoming, *In re Natural Gas Royalties Qui Tam Litig.*, MDL Docket No. 1293, which includes a number of *qui tam* suits filed by Jack Grynberg against numerous oil and gas companies alleging, primarily, underpayment of federal and Indian royalties based on the misreporting of the volume of gas produced. While some of those complaints also allege the underpayment of royalties based on undervaluation, the United States has filed a motion seeking dismissal of those valuation claims on the basis that they are improperly asserted.

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Accordingly, to avoid conflicting rulings concerning which of these four relators is the proper relator and to avoid unnecessary inconvenience and expense for the parties and witnesses involved in these matters, pursuant to 28 U.S.C. § 1404(a), the United States requests that this action be transferred to the Eastern District of Texas, Lufkin Division. The relator in this action, Mark A. Perry, consents to the United States' motion. On July 27, 2000, the United States contacted defendants' counsel to determine if defendants opposed the government's motion, and defense counsel stated that as defendants have not yet been served with a complaint in this action, they do not consider themselves parties to the suit and, thus, will not take a position – in support of or in opposition to – the government's motion.[3/]

BACKGROUND

On May 28, 1999, Perry filed this *qui tam* action, and on March 28, 2000, the United States filed a notice of intervention in the action. That same day, the Court ordered that the relator's complaint be unsealed and granted the government 60 days in which to file its own complaint. Subsequently, the Court granted the United States an extension of time until July 31, 2000, within which to file a complaint, or in lieu of filing a complaint, to file a motion to dismiss. For the reasons discussed below, the United States now moves the Court to transfer this matter to the Eastern District of Texas, where the United States would then file its complaint or move to dismiss the action.

[3/] To the extent that neither a complaint nor an answer have been served in this case, under Fed. R. Civ. P. 41(a)(1), the relator and the United States could move the underlying claims in this case to the Eastern District of Texas by voluntarily dismissing the instant action and filing a new suit in that district. The parties believe, however, that the most efficient method of moving this matter to that district is via a motion to transfer, especially in light of the unique procedural requirements of the *qui tam* provisions of the FCA.

I. THE FALSE CLAIMS ACT

The False Claims Act makes a person liable to the United States for knowingly making, presenting or causing to be made or presented false claims or statements in order to obtain payment by the government or to decrease an obligation owed to the government. *See generally* 31 U.S.C. § 3729(a). A person acts "knowingly" when the person has actual knowledge of the false information, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information. *Id.* § 3729(b). If a person is found liable under the Act, then damages are automatically assessed at three times the amount of the government's loss, and the government is further awarded civil penalties for each false claim. *Id.* § 3729(a).

Pursuant to the *qui tam* provisions of the FCA, a private person, or relator, may initiate suit in the name of the United States for a violation of the Act. 31 U.S.C. § 3730(b)(1). The relator initially files a complaint under seal and provides the government with a written disclosure of material evidence and information about the case, and the United States has an opportunity to investigate the relator's allegations. *Id.* § 3730(b)(2). Should the United States decide to pursue the case, it intervenes in the relator's suit and takes over prosecution of the FCA claims, while the relator remains a party to the case. *Id.* § 3730(c)(1). Otherwise, the United States may decline the case, and the relator is allowed to continue with the action. *Id.* § 3730(c)(3). Whether the United States intervenes or declines, it remains the real party in interest. *See United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48-49 (4th Cir. 1992).

The relator's incentive for bringing an FCA case is a share of the proceeds of the action or

settlement of the claim. 31 U.S.C. § 3730(d). The FCA provides various restrictions on who constitutes a proper relator and contemplates that only one relator shall share in the proceeds of a given claim. For instance, the Act contains a "first to file" rule: "When a person brings an action under this subsection, no person other than the government may intervene or bring a related action based on the facts underlying the pending action." *Id.* § 3730(b)(5).

II. NATURAL GAS ROYALTIES ON FEDERAL AND TRIBAL LANDS

Perry's suit and the three actions pending in the Eastern District of Texas all concern the alleged underpayment of royalties on gas produced from federal and Indian lands. By statute, the U.S. Department of the Interior, Minerals Management Service (MMS) administers the federal and Indian royalty program which governs the payment of royalties by private oil and gas companies which have entered into lease agreements with the United States allowing them to remove gas from federal and Indian lands. *See* 30 U.S.C. §§ 1701-1757. MMS is responsible for setting, collecting, and auditing the payment of royalties, as well as for formulating policy and promulgating and interpreting regulations. In some instances, MMS's duty to audit leases is delegated to states and tribes which conduct audits of federal and Indian leases located within the respective states or tribal areas.

The oil and gas companies are responsible for reporting to MMS the quantity and quality of gas (including NGLs) produced from federal and tribal lands, the value of such gas, and the amount of royalties the company is paying. This summary information is reported monthly on an MMS Form 2014. In determining the value reported on the MMS Form 2014, companies are allowed by regulation to take deductions for certain costs incurred in processing and transporting the gas produced. *See* 30 C.F.R. §§ 206.156 - 206.159. Knowingly underreporting the volume

or value of gas produced on federal or tribal lands would constitute a false statement made in order to decrease an obligation to pay money to the United States, in violation of the FCA.

III. THE FOUR PENDING GAS *QUI TAM* SUITS

On August 2, 1996, Gene Wright filed a *qui tam* suit in the Eastern District of Texas against a number of gas and oil companies, alleging FCA violations in connection with the valuation of royalties on oil and gas production from federal and Indian lands. Declaration of Gregory Pearson, ¶ 2 (attached as Exh. A). That action is captioned *United States ex rel. Wright v. AGIP Petroleum Co.*, Civil Action No. 9:98CV30 (E.D. Tex.). *Id.* Shortly thereafter, the United States, acting through the Department of the Interior, Office of the Inspector General and the Department of Justice, began its investigation of Wright's charges. *Id.* at ¶ 3. In January 1998, Wright's allegations concerning oil were severed from his action, and on April 2, 1998, he filed a separate second amended complaint involving only gas and naming, among other defendants, Meridian Oil Inc. (the predecessor of Burlington Resources, Inc.), its divisions, subsidiaries and affiliates (referred to collectively herein as "Burlington"). *Id.* at ¶ 4.

Since that time, at least three other individuals, including Perry, have filed *qui tams* under the FCA making allegations similar to Wright's. *Id.* at ¶ 5. Those suits are as follows: (1) *United States ex rel. Osterhoudt v. Amoco Prod. Co.*, Civil Action No. 9:98CV101 (E.D. Tex.), filed July 24, 1998; (2) *United States ex rel. Perry v. Burlington Resources, Inc.*, Civil Action No. 99-562-JP (D.N.M.), filed May 18, 1999; and (3) *United States ex rel. Murray v. Mobil Oil Corp.*, Civil Action No. 9:99CV340 (E.D. Tex.), filed July 7, 1999. *Id.* Save Perry's suit, all of these cases, including *Wright*, are pending before Judge Hannah in the Eastern District of Texas. *Id.* On March 28, 2000, the United States intervened in *Wright, Osterhoudt, Murray and Perry.*

Id. at ¶ 6.

DISCUSSION

Transfer of this case to the Eastern District of Texas to be consolidated with the other suits before Judge Hannah would result in a more efficient litigation of the four *qui tam* relators' overlapping claims, as well as greater convenience and less expense for the necessary witnesses and the parties. The transfer of civil cases from one district to another is governed by 28 U.S.C. § 1404(a) which provides:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The purpose of this provision is to "prevent the waste of time, energy and money" and "to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Continental Grain Co. v. Barge F.B.L.-585*, 364 U.S. 19, 26-27 (1960). To this end, § 1404(a) was enacted as a "federal housekeeping measure" designed to allow "easy change of venue within a unified federal system." *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1515 (10th Cir. 1991) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981)). The section places discretion in the district court to adjudicate motions for transfer based on an individual, case-by-case basis. *Chrysler Credit Corp., 928 F.2d at 1515-16* (10th Cir. 1991).[4/]

Perhaps the most important reason to transfer this case is to avoid conflicting rulings on

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[4/] As a preliminary matter, Perry's action "might have been brought" in the in the District Court for the Eastern District of Texas since that court would have jurisdiction over his action under 28 U.S.C. §§ 1331 and 1345 and venue would be proper under 31 U.S.C. § 3732(a) and 28 U.S.C. §§ 1391(b) and (c), since the Burlington defendants reside and/or transact business within that district.

the issue of which one of the four relators who have filed *qui tam* suits alleging the undervaluation of gas royalties is the proper relator. Under the FCA, would-be relators must meet certain requirements before they can be considered proper relators. For example, unless a relator is the original source of the information on which his allegations are based, a suit based on publicly disclosed allegations or transactions is jurisdictionally barred. *See* 31 U.S.C. § 3730(e)(4). Also, the Act imposes a first-to-file rule which provides that after a relator brings a *qui tam* action, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). The United States submits that the determination concerning which of the relators is proper should be made by one court so as to avoid contrary rulings and the possibility that two relators will pursue essentially duplicative suits in different courts, resulting in unnecessary inconvenience and expense for witnesses, litigants and the public. *See Continental Grain Co.,* 364 U.S. at 21 (finding that § 1404(a) contemplates that similar claims between the same parties involving the same incidents should be tried before the same court). Since all four relators, save Perry, are now before Judge Hannah in the Eastern District of Texas, transferring Perry's case to that district would prevent the possibility of conflicting decisions on the issue of relators' status.[5/]

In addition to avoiding contrary decisions and dual actions on the same issues, the Tenth Circuit has listed the following as among the factors a court should consider in making a transfer determination:

[5/] Also, transferring this case to the Eastern District of Texas, Lufkin Division, would ensure that each relator has an opportunity to present his case on why he is the proper relator to the same court.

> [1] the plaintiff's choice of forum; [2] the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; [3] the cost of making the necessary proof; [4] questions as to the enforceability of a judgment if one is obtained; [5] relative advantages and obstacles to a fair trial; [6] difficulties that may arise from congested dockets; [7] the possibility of the existence of questions arising in the area of conflict of laws; [8] the advantage of having a local court determine questions of local law; and, [9] all other considerations of a practical nature that make a trial easy, expeditious and economical.

Chrysler Credit Corp. at 1516 (quoting *Texas Gulf Sulphur Co. v. Ritter*, 371 F.2d 145, 147 (10th Cir.1967)). An examination of these factors shows that they weigh heavily in support of moving this case to the Eastern District of Texas.

First, the plaintiff's choice of forum is entitled to strong deference. *Wm. A. Smith Contracting Co., Inc. v. Travelers Indemnity Co.*, 467 F.2d 662, 664 (10th Cir. 1972). Here, both plaintiffs in this action — the United States and the relator — prefer that this case be transferred to the Eastern District of Texas. Indeed, the case would have been filed in that district but for the unusual procedural mechanism of the FCA whereby the relator, rather than the government, files the first complaint in a *qui tam* action. *See* 31 U.S.C. § 3730. While there are two plaintiffs in this action, the United States is the real party in interest. *See United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 48-49 (4th Cir. 1992) (United States is always a real party in interest in a *qui tam* action, even after declination). *Qui tam* actions are brought by individuals "in the name of the Government" and relators have no independent right to sue under the FCA. *See* 31 U.S.C. § 3730(b)(1). To this end, the Act contemplates that once the government intervenes in a *qui tam* case, it will then assume control of the litigation. 31 U.S.C. § 3730(c)(1). Accordingly, when a motion to transfer is at issue in a *qui tam* suit, the government's choice of forum should be given great weight. *United States ex*

rel. Penizotto v. Bates East Corp., Civ. Action No. 94-3626, 1996 WL 417172 at *2 (E.D. Penn. July 18, 1996) (holding that the government's choice of forum controls).

Second, Texas would be the more convenient forum for most of the witnesses who might be deposed or called at trial in this action. In is clear that the majority of pertinent witnesses will be personnel of the Burlington defendants or personnel of MMS, the main parties in this case and the two entities with the most knowledge of the conduct at issue. *See* Exh. A, ¶ 7. Most of the relevant Burlington employees reside in the Houston area — the location of the defendants' main offices and corporate headquarters — which is less than a hundred miles from the Eastern District of Texas. *Id.* The relevant MMS personnel are located in Denver, Houston and Dallas. *Id.* While travel from Denver to either of the two districts would be equally inconvenient, the Eastern District of Texas would be more convenient for the MMS employees located in Houston and Dallas. [9]

Third, the cost of making the necessary proof would be less if this case were moved to the Eastern District of Texas because, in addition to the relevant witnesses, the majority of pertinent documents are located in Burlington's offices in Houston or MMS's offices in Denver, Houston or Dallas. *Id.* at ¶ 8. As such, it would be significantly cheaper for defendants, relator and the government to make their proof in Texas.

Several of the other *Chrysler Credit/Texas Gulf Sulphur* factors to be considered do not weigh significantly for either forum. With respect to the fourth factor, a judgment in this matter

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[9] With respect to the availability of compulsory process to insure attendance of other witnesses, the False Claims Act provides for compulsory process anywhere in the United States, 31 U.S.C. § 3731(a), therefore that factor is irrelevant in this case.

would be equally enforceable in the Eastern District of Texas as in this district. Fifth, it is not likely that defendants would receive an unfair trial in either district. Sixth, the United States submits that the relative caseloads handled by the two courts is relatively equivalent. Seventh, it is unlikely that any substantial conflict of laws issues will arise, or that these issues cannot be resolved in Texas. Eighth, the law to be applied in this case is largely federal statutory and common law, and therefore, local law does not constitute a significant issue.

Finally, practical considerations suggest that this case should be tried before Judge Hannah in the Eastern District of Texas. Judge Hannah currently is presiding over an oil royalties *qui tam* case in which the United States has intervened. *United States ex rel. Johnson v. Shell Oil Co.*, Civil Action No. 9:96CV66 (E.D. Tex.). Further in connection with *Johnson*, Judge Hannah has dealt with FCA issues, including determining who is a proper relator. *See United States ex rel. Johnson v. Shell Oil Co.*, 33 F. Supp. 2d 528 (E.D. Tex. 1999). Moreover, in the event Judge Hannah finds more than one relator to be proper, he will likely consolidate the respective cases pending on his docket for at least pre-trial purposes and thus eliminate overlapping discovery.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court transfer this matter, in accord with 28 U.S.C. § 1404(a) to the Eastern District of Texas.

Respectfully submitted,

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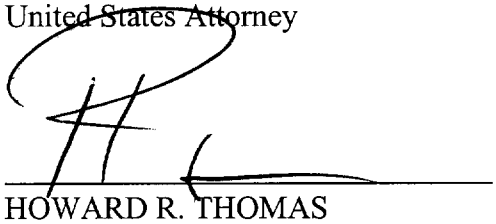

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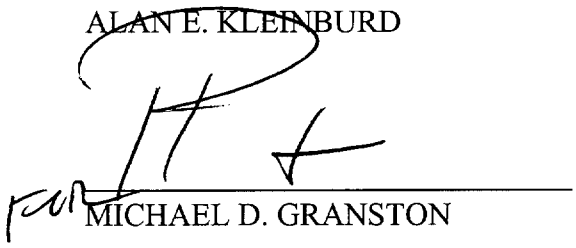

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ATTORNEYS FOR THE UNITED STATES
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Dated: July 26, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July 2000, the foregoing The United States' Motion to Transfer this Action to the Eastern District of Texas, Lufkin Division, Memorandum in Support and proposed Order were served via first-class mail, postage prepaid, on the following:

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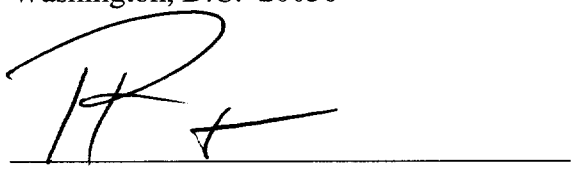

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